



APPENDIX B

RESPONSE TO NEW MEXICO'S OBJECTIONS TO PROPOSED DECREE

In Appendix A of its exceptions, New Mexico makes six objections to the Special Master's proposed decree. Texas supports the Special Master's proposed decree, with the modifications proposed by Texas in Appendix B of its exception, and requests that it be entered by the Court. Texas will respond to New Mexico's objections in the numerical order in which they are set out in Appendix A to New Mexico's exceptions.

1. Sections II(A) and II(B) of the proposed decree do not deprive the Pecos River Commission of its discretionary powers under the Compact. The Court has previously determined that, where the Commission has not adopted "a more feasible method" for determining departures, the Court may decide whether a particular method may be used under the provisions of the Compact to measure departures in enforcing the Compact. *See Texas v. New Mexico*, 462 U.S. 554, 573 (1983). The Court made such a decision regarding Tex. Exh. 68 when it approved the 1984 Report, thereby adopting the Special Master's recommendation that the inflow-outflow equation in Tex. Exh. 68 at page 2 be used to determine departures from New Mexico's Article III(a) delivery obligations. *Texas v. New Mexico*, 467 U.S. 1238 (1984). Similarly, the Court may, and should, decide that Tex. Exh. 79 will be used to calculate the index inflow component of the inflow-outflow equation in Tex. Exh. 68 at page 2, as specified in Section II(B) of the proposed decree.

The equations and procedures in Tex. Exh. 79 will allow the Commission to accurately compute flood inflows in future years. If the states eventually determine and agree that the equations or procedures in Tex. Exh. 79 should be changed, or that a different method of river accounting should be adopted, the states may jointly apply to the Court to lift or modify the injunctive provisions of the decree.

2. The appointment of a river master is permissible and warranted if the Court determines that it is necessary to enforce

the Court's decree. The Special Master noted that the Court might wish to appoint a river master "for the sole purpose of determining whether New Mexico has complied with the decree." 1986 Report 43. Certainly the Court is free to fashion such relief as is necessary for that purpose.

Texas is not now requesting the Court to appoint a river master. Texas believes that the Special Master's proposed decree contains the mechanisms and sufficient incentive for compliance and would, if adopted by the Court, adequately protect Texas' interests in this matter. Should New Mexico later prove unwilling to comply with the decree, Texas may, to secure compliance, either request the appointment of a river master or move for the entry of an order of contempt.

3. New Mexico's complaint regarding Section II of the proposed decree, that certain adjustments are not included in either Tex. Exh. 68 or in Tex. Exh. 79, is wholly without merit, since the Special Master has recognized that Tex. Exh. 79 will have to be modified or adjusted to conform to the Court's decisions on man-made depletions chargeable to New Mexico. 1986 Report A-1, n.1.

4. Section II(A) of the proposed decree correctly requires that the inflow-outflow equation in Tex. Exh. 68 at page 2 be used to determine New Mexico's Article III(a) delivery obligation. This is in conformity with the Court's approval of the 1984 Report in which the Special Master recommended that the equation be used for this purpose. 467 U.S. 1238 (1984).

Ignoring this prior approval by the Court, New Mexico argues that the inflow-outflow equation in Tex. Exh. 68 at page 2 must be adjusted for variations in factors such as the location of flood inflows, reservoir operation, and precipitation. This argument, however, overlooks the fact that the inflow-outflow equation was derived from many years of complex hydrologic data, which included variations in such factors, and the equation is, therefore, designed for, and compatible with, complex hydrology. *See Tex. Exh. 68 at 1-19.* The argument also ignores the adjustment flexibility inherent in the progressive three-year averages required by Article VI(b) of the Compact.

5. Section II(C) of the Special Master's proposed decree is clear that no more than 340,100 acre-feet of water are required to be repaid to Texas over a ten-year period. New Mexico is to satisfy this repayment duty by delivering to the Texas state line, during each year of the ten-year period, an Annual Minimum Delivery Obligation of at least 34,010 acre-feet, after having delivered its annual delivery obligation under Article III(a) of the Compact. Any quantity of water delivered in excess of the Annual Minimum Delivery Obligation would necessarily be credited towards, and reduce, the total amount required to be repaid.

6. The reference in Section IV of the proposed decree to "Section II(B)" is obviously a typographical error. The correct reference should be to "Section II(C)," as was pointed out on page 6 of Texas' exception.